FILE COPY

FILED
NOV 28 1945
CHARLES ELMORE CROPLEY
CLERK

No. 203

In the Supreme Court of the United States

OCTOBER TERM, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Specification of error to be urged	9
Summary of argument	9
Argument:	
Section 811(d)(2) of the Internal Revenue Code requires that the decedent's interest in the trust property be included in his gross estate	10
A. The interests of the beneficiaries of the trust were subject to changes in enjoyment at the time of the decedent's death	10
B. The decedent had the power to "alter, amend, or revoke"	24
C. Decedent's power to terminate was exercisable by him as grantor, but in any event, the capacity in which it was exercisable is immaterial	38
Conclusion	41
Appendix	42

CITATIONS

Cases:	
Chickering v. *Commissioner*, 118 F. 2d 254, certiorari denied, 314 U. S. 636	18
Commissioner v. *Ballard*, 138 F. 2d 512, affirming, 47 B. T. A. 784	19
Commissioner v. *Bridgeport City Trust Co.*, 124 F. 2d 48, certiorari denied, 316 U. S. 672	19
Commissioner v. *Chase Nat. Bank*, 82 F. 2d 157, certiorari denied, 299 U. S. 552	19
Commissioner v. *Hofheimer's Estate*, 149 F. 2d 733	18, 22, 28, 29, 30, 32, 34
Cook v. *Commissioner*, 66 F. 2d 995, certiorari denied, 291 U. S. 660	19
Fidelity Co. v. *Rothensies*, 324 U. S. 108	21
Goldstone v. *United States*, No. 609, 1944 Term, decided June 11, 1945	22
Guggenheim v. *Helvering*, 117 F. 2d 469, certiorari denied, 314 U. S. 621	19

Cases—Continued Page

Hartleg v. *Commissioner*, 295 U. S. 216 27
Helvering v. *Hallock*, 309 U. S. 106 29
Helvering v. *Tetzlaff*, 141 F. 2d 8 19
Holderness v. *Commissioner*, 86 F. 2d 137 19
Hofheimer v. *Commissioner*, 2 T. C. 773 31
Mellon v. *Driscoll*, 117 F. 2d 477, certiorari denied, 313 U. S. 579 ..... 19, 23, 28, 32, 33, 34
Merrill v. *Fahs*, 324 U. S. 308 27
Millard v. *Maloney*, 121 F. 2d 257, certiorari denied, 314 U. S. 636 19
Nettleton, Estate of v. *Commissioner*, 4 T. C. 987 ..... 16, 40
Porter v. *Commissioner*, 288 U. S. 436 ..... 18, 20, 28
Sanford, Estate of v. *Commissioner*, 308 U. S. 39 ..... 35, 38
Smith v. *Shaughnessy*, 318 U. S. 176 38
Union Trust Co. of Pittsburgh v. *Driscoll*, 138 F. 2d 152, certiorari denied, 321 U. S. 764 ..... 19, 40
Welch v. *Terhune*, 126 F. 2d 695, certiorari denied, 317 U. S. 644 40
White v. *Poor*, 296 U. S. 98 ..... 25, 26, 40

Statutes:
Internal Revenue Code:
Sec. 811 (26 U. S. C. 811) 10, 13, 21, 24, 25, 29, 42
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302 40
Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 805 ..... 25, 26, 40

Miscellaneous:
H. R. 12793, 74th Cong., 2d Sess. 26
H. Rep. No. 179, 68th Cong., 1st Sess., p. 65 (1939–1 Cum. Bull. (Part 2) 241) 35
H. Rep. No. 2818, 74th Cong., 2d Sess., pp. 9, 10 26
Restatement of the Law of Property (1936), Sec. 157 14
S. Rep. No. 398, 68th Cong., 1st Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 266) 35
Treasury Regulations 105:
Sec. 81.15 43
Sec. 81.20 ..... 27, 40, 43
Treasury Regulations 108, Sec. 86.3 ..... 36, 37

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 203

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 11–20) is reported at 3 T. C. 571. The opinion of the Circuit Court of Appeals (R. 39–43), and the dissenting opinion of Judge McCord (R. 43–44), are reported at 148 F. 2d 740.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 44–45) was entered on April 14, 1945. The petition for a writ of certiorari was filed on July 6, 1945, and was granted on October 8, 1945 (R. 45). The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent transferred certain property in trust. The income beneficiaries were his three sons, or certain other contingent beneficiaries. The grantor, as trustee, had the power to withhold income payments from the sons, as he determined to be for their best interests; he could also invade the corpus for the maintenance, comfort, welfare or happiness of the sons or of any other income beneficiary. The trust was to continue for a period of fifteen years, but under certain contingencies might continue for a longer time. Upon termination of the trust, the corpus was to be paid to the sons, if then living, and if not, to other contingent beneficiaries. The decedent reserved the power to terminate the trust at any time, and thereby to pay the corpus to the beneficiaries then entitled to receive it.

The question is whether the interests thus created were subject to changes in enjoyment through the exercise of a power by the decedent to alter, amend, or revoke, within the meaning of Section 811 (d) (2) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved are set forth in the Appendix, *infra*, pp. 42–45.

STATEMENT

The facts in this case were stipulated by the parties (R. 25–38), and were found by the Tax Court as stipulated (R. 12).

On January 20, 1935, the decedent transferred to himself, as trustee, and to the successor trustees which were provided for, thirty shares of the capital stock of the Quintana Petroleum Company to be held in trust in equal shares for the benefit of his three sons and certain other contingent beneficiaries (R. 25). This stock was a part of the community estate of the decedent and his wife (R. 25).

Paragraphs Fourth, Fifth and Sixth of the trust instrument (R. 31–35) provided, in substantially identical terms, for the interests of each of the decedent's three sons and for the interests of other contingent beneficiaries. Thus, as to the share of Harry Holmes, Junior, the trust provided (R. 31–32):

> FOURTH
>
> During the lifetime of my son, Harry Holmes, Jr., and prior to the termination of the trust herein created for his benefit, the Trustee shall distribute the net income from the share or trust so allocated to my son, Harry Holmes, Jr., to him in convenient installments, preferably monthly; provided the Trustee may withhold distribution of any portion of said net income, should he determine it for the best interest

of my said son, any portion of said net income so withheld to be accumulated for his benefit; provided, should my said son, Harry Holmes, Jr., die during the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to such beneficiary, and the trust, as it relates to such portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance, and education, until such beneficiary arrives at the age of twenty-one (21) years, any unused portion of said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or she shall have theretofore received the income.

If my son, Harry Holmes, Jr., shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of

such events, the share or trust that would have gone to my said son, Harry Holmes, Jr., or his said issue, shall enure pro rata to my sons, John B. Holmes and Thomas J. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons John B. Holmes or Thomas J. Holmes, should then be dead without issue, the whole of such share or trust shall enure to the survivor, or to the issue of the other, to be administered and distributed in the same manner as hereinafter provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust, it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, Harry Holmes, Jr., or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the

education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder. Grantor hereby suggests that the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution of said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

The trust instrument also provided (R. 36, 37):

ELEVENTH

Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And Grantor may, during his life-time, if deemed advisable by him, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons en-

titled to receive the same under the terms hereof on the date of such termination.

* * * * * * *

THIRTEENTH

The several trusts herein created shall continue and exist and be administered by the Trustee as herein provided (unless distributed by Grantor prior to his death, or distributed by Harry Holmes, Jr., John B. Holmes or Thomas J. Holmes, while they are acting as Trustees, as hereinbefore provided), for the period of fifteen (15) years from this date, provided that if, at the expiration of fifteen (15) years there are beneficiaries hereunder under the age of twenty-one (21) years, the trustee [trust] shall be continued as to such beneficiaries' share or portion of such Trust Estate until such beneficiaries shall reach the age of twenty-one (21) years, or shall die, in either of which events, the trust as to such portion shall terminate, and provided further, and it is hereby made an express condition of this trust, that the same shall terminate twenty-one (21) years after the death of the last survivor of my said sons.

Upon the termination of the trust herein created or of said respective trusts, as herein provided, the entire Trust Estate then remaining in the hands of the Trustee, whether principal or accumulated income, shall be immediately divided, distributed and paid over to the persons who are en-

673705—45——2

titled to receive the same in the proportions and according to the provisions of this agreement.

The Quintana Petroleum Company was liquidated on December 31, 1938, as a result of which a *pro rata* part of the assets of the company was conveyed to the decedent as trustee (R. 25). The decedent did not relinquish his duties as trustee, but continued to act in that capacity until the date of his death, October 5, 1940 (R. 25). In the estate tax return filed by taxpayer, the executrix of the decedent's estate, the property which had been transferred by the decedent to the trust was not returned as a part of his gross estate (R. 26). The fair market value of a one-half interest in the trust assets was, at the time of the decedent's death, $91,593.17 (R. 25).

The Commissioner determined a deficiency in estate tax because of the taxpayer's failure to include in the decedent's gross estate, pursuant to the provisions of Section 811 (d) of the Internal Revenue Code, his community property interest in the assets of the trust (R. 5–9). The taxpayer sought a redetermination of the deficiency before the Tax Court, which ruled that the property was not includible in the decedent's gross estate and decided that there was no deficiency in estate tax (R. 11–20). The Circuit Court of Appeals, Judge McCord dissenting, affirmed the decision of the Tax Court (R. 39–44).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the transfers made by the decedent were not required to be included in his gross estate under Section 811 (d) (2) of the Internal Revenue Code.

SUMMARY OF ARGUMENT

The decedent established a trust wherein he created interests, the beneficiaries of which were only contingently entitled to enjoyment of the corpus or the income therefrom. To acquire full ownership of the corpus, the beneficiaries were required, under the trust instrument, to be alive at the time when the property became distributable. If any named beneficiary was not in existence at that time, other contingent beneficiaries would succeed to their rights. The contingent right of the beneficiaries were made even more uncertain because the decedent could withhold and accumulate income payments, and could invade the principal for the benefit of the income beneficiaries. The decedent, moreover, reserved the power to distribute the corpus during his lifetime and, thereby, to give present ownership to known beneficiaries and to extinguish the rights of all other unknown, contingent beneficiaries.

The decedent did not exercise his power to make a complete transfer of the property during his lifetime. Only when death terminated the decedent's powers, was there a completed transfer from him. The enjoyment of all the beneficial

interests was, at the time of his death, subject to change through the exercise of decedent's reserved powers, and the legislative history of the governing statute and the regulations promulgated thereunder make it clear that these reserved powers constituted a power to "alter, amend, or revoke" within the meaning of Section 811 (d) (2) of the Internal Revenue Code.

By the terms of the trust instrument, the decedent reserved to himself, in his individual capacity, a right to terminate the trust. However, even if the instrument can be construed to mean that this power was exercisable by the decedent in his capacity as trustee, Section 811 (d) (2) of the Internal Revenue Code is nevertheless applicable.

ARGUMENT

Section 811 (d) (2) of the Internal Revenue Code requires that the decedent's interest in the trust property be included in his gross estate

Section 811 (d) (2) of the Internal Revenue Code (Appendix, *infra*, pp. 42–43) requires that there be included in a decedent's gross estate the value of any interest transferred by him during his lifetime if, at the date of his death, the enjoyment of the interest created was subject to change through the exercise by him of a power to alter, amend, or revoke.

A. *The interests of the beneficiaries of the trust were subject to changes in enjoyment at the time of the decedent's death.*—Each of the interests

in the trust created by the decedent in this case was subject to changes in enjoyment which he could have brought about during his lifetime if he had exercised the powers reserved to him in the trust instrument. Because the decedent died without having exercised his powers, the created interests were no longer susceptible to changes in enjoyment on account of his authority, and only when death terminated his authority was there a completed transfer from him of property which was subject to his control during his lifetime. As a result, the clear provisions of the statute necessitate that the value of the property conveyed in trust (to the extent of the decedent's community property interest) be included in his gross estate.

The provisions of the trust instrument plainly demonstrate that, until the time of his death, the decedent could have caused a transformation in the enjoyment of the interests of each beneficiary. The trust named the decedent as trustee (R. 26–27), and provided that the corpus should be divided into three equal shares for each of the decedent's three sons, their surviving issue and the other beneficiaries provided for in the instrument (R. 30–32). The provisions of the trust instrument with respect to each of the three shares were, except for names, identical (R. 31–35). It was provided that the income from each share should be paid to the designated son during the continuance of the trust. If the son should die

leaving surviving issue, the income would be paid to such issue,[1] but if there were none, then it would be paid to the decedent's other two children, or their surviving issue.[2] (R. 31–32.) The trustee was authorized to withhold income payments from any son and to accumulate for the son's benefit the amounts withheld (R. 31); also, spendthrift limitations prevented anticipatory disposition by the sons of the trust income prior to actual receipt (R. 35).

The separate portions of the trust corpus were to be distributed to each of the decedent's three children who survived the duration of the trust (R. 31–32, 36, 37). Prior to that time, they were prevented, on account of the spendthrift provisions, from anticipating in any manner their possible right to receive the corpus (R. 35). If any son should fail to survive the duration of the trust, the share would go to such of his issue as survived the age of 21; if any son died during the continuance of the trust without leaving surviving issue, or if all his issue died during that time before attaining their majority, the share would be distributed on the termination of the trust to the decedent's other two children, or their

[1] If the issue were over the age of 21, the corpus would be distributed to them immediately; otherwise, the income would be used for purposes of maintenance and support of issue under 21, the corpus and accumulated income being distributable as each attained his majority (R. 31–32).

[2] See note 1, *supra*.

surviving issue (R. 31). If all the decedent's children died before the termination of the trust without leaving surviving issue, or if all their issue died under the age of 21, the corpus was to be distributed to the decedent's widow, or to her lawful heirs (R. 32).

The trust, by its terms, was to be in existence for a period of fifteen years, except that, at the expiration of that time, if there were beneficiaries under the age of 21 years the trust would continue with respect to their interests until they reached their majority or died. At all events, the trust was to terminate within 21 years after the death of the last survivor of the decedent's sons (R. 37).

The authority retained by the decedent which, the Commissioner contends, brings the value of the decedent's community interest in the trust property into the gross estate by reason of the provisions of Section 811 (d) (2) of the Internal Revenue Code (Appendix, *infra,* pp. 42–43) is set forth principally in paragraph Eleventh of the trust instrument (R. 36). The decedent was therein empowered, during his lifetime, to "distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder" and he was further authorized to "terminate either or all of said trusts * * * and distribute the principal of the trust to the persons entitled to

receive the same under the terms hereof on the date of such termination."

It can only be concluded that, until the trust terminated by its own terms, the beneficiaries, whether named or not, did not have a present interest in the corpus of the trust which was capable of immediate enjoyment in any respect, the spendthrift provisions preventing any anticipatory enjoyment. Only by surviving the duration of the trust could a beneficiary, whether named or not, acquire any ownership rights in a share of the corpus. Also, the amount of the corpus which any surviving beneficiary would acquire upon termination of the trust would be determined by the number of other eligible beneficiaries then in existence. Thus, until the time for distribution arrived, the beneficiaries who would be entitled to the corpus could not be ascertained and, until that time, it could not be known how the corpus would be apportioned among them.[3]

---

[3] If nomenclature of the law of property is employed, the interest of each son in one-third of the corpus could be classified as "vested subject to complete defeasance," and the interest of each son in the remaining two-thirds of the corpus and the interests of each unnamed beneficiary could be classified as "subject to a condition precedent." *Restatement of the Law of Property* (1936), Section 157. For convenience, the word "contingent" is sometimes used in the brief to describe both types of interests because of the uncertainties to which each are subject.

The changes in enjoyment which the decedent could have brought about during his lifetime by exercising his right to make completed gifts of the corpus to his sons (or to other beneficiaries, if his sons had not lived), are readily apparent. The wholly contingent and speculative rights of the decedent's sons to acquire future possession and enjoyment of the trust corpus could have been transformed by the decedent into rights of present and complete ownership. By the same token, if the decedent had utilized his reserved powers, he could have extinguished the contingent interests which each son would have in his brothers' putative shares of the corpus, the contingent interests in the corpus of the issue, or potential issue, of each son, and also the contingent interests of the decedent's wife and her heirs. The fact that each son, after the decedent's death, still possessed only the possibility of coming into possession and enjoyment of a share of the corpus is due to the decedent's forbearance and abstention from making completed gifts prior to his death. If, after the decedent's death, any of the sons should take more than one-third of the corpus, or if their issue or the decedent's wife should ever come into possession of a portion or all of the trust estate, their enjoyment will be directly traceable to the fact that the decedent did not extinguish their contingent interests as he might have done under the trust instrument.

673705—45——3

The same effect on the beneficial interests, which would have ensued from an exercise of the decedent's authority under Paragraph Eleventh, would have also resulted to the extent that the decedent might have invaded the corpus for the comfort, education, maintenance, welfare or happiness of any income beneficiary, as he was authorized to do (R. 32). The use of the corpus in this manner would have also resulted in the decedent giving away all or part of the corpus during his lifetime and in taking that amount of the property from those who might have become entitled to receive the gifts over.[4]

---

[4] The decision of the Tax Court in the present case may be contrasted with *Estate of Nettleton* v. *Commissioner*, 4 T. C. 987, where the value of the remainder was held to be taxable under Section 811 (d) (2) of the Internal Revenue Code because the decedent could use, in his discretion, part of the trust corpus for the welfare of the life tenant. The Tax Court said (p. 991):

"The reservation of this right constituted a string upon the enjoyment of the beneficial interests and a power to change the enjoyment of those interests. The share of the remaindermen could be diminished by decedent as trustee in favor of his daughter, the life tenant, to whatever extent he considered 'suitable and necessary in the interests and for the welfare' of the daughter."

It is not possible to harmonize the decisions of the Tax Court in that case and in the present case. The identity of the remainderman there, as here, was not ascertainable when the trust was created or when the decedent died. Since the decedent here could diminish the share of the remaindermen by using the corpus for the income beneficiaries, the cases are irreconcilable in that respect. In the present case the donor reserved even greater powers than in the *Nettleton* case for

The above-described subjection of the beneficial interests in the trust to the decedent's powers to ensure or eliminate their enjoyment can hardly be described, with any accuracy, as a subjection of these interests to a mere power to accelerate enjoyment. Cf. R. 20.[5] There are few situations to which the statutory language could more aptly apply than to the changes in enjoyment to which the beneficial interests in this case were subject because of the decedent's reserved power to alter, amend or revoke them.

The Circuit Court of Appeals, however, concluded that the decedent's authority did not come within the provisions of Section 811 (d) (2) of the Internal Revenue Code, stating (R. 42):

> Of critical importance in the case at bar is the fact that the trust instrument not only operated to convey the trust estate, but the instrument also provided that, if the decedent exercised his power as trustee to terminate the instrument, the ownership of the properties should vest in named beneficiaries other than the grantor. The power to terminate was not capable of being so exercised as to revest in the decedent any legal

---

here, as discussed in the body of the brief, he was authorized to extinguish the remainders completely.

[5] It is not necessary to decide, in this case, whether a decedent's power merely to accelerate enjoyment will bring the interest subjected to that power into the gross estate. It is difficult, moreover, to envisage a situation involving only acceleration and without any other changes in enjoyment.

> or beneficial title to any interest in the trust property, nor could it operate to empower the decedent to choose different beneficiaries from those named, or to alter the benefits received by them.[6]

The first consideration relied on by the court below, namely, that the decedent did not reserve the power to benefit himself or to recapture the property is not of "critical importance", for it is settled that the absence of the possibility of reacquisition will not prevent the transfer from being taxed at death. *Porter* v. *Commissioner*, 288 U. S. 436. The second point which the court thought persuasive is also contrary to authority. While this Court has not had occasion to consider the matter directly, it has unanimously been held in other circuits that the statute is operative even though the decedent is not empowered to select any new beneficiaries and even though he can change the enjoyment of only those interests which were created by the instrument. *Chickering* v. *Commissioner*, 118 F. 2d 254 (C. C. A. 1st), certiorari denied, 314 U. S. 636; *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733 (C. C. A. 2nd);

---

[6] The court similarly stated (R. 41):

"Since the reservation in the present case did not empower the donor either to revoke the trust instrument and recapture the trust property, or to modify the terms of that instrument so as to designate new beneficiaries or in any other manner change the fixed provisions thereof, it is patent that the Commissioner is now seeking to extend the rule beyond the bounds long established."

Commissioner v. *Bridgeport City Trust Co.*, 124 F. 2d 48 (C. C. A. 2nd), certiorari denied, 316 U. S. 672; *Guggenheim* v. *Helvering*, 117 F. 2d 469 (C. C. A. 2nd), certiorari denied, 314 U. S. 621; *Commissioner* v. *Chase Nat. Bank*, 82 F. 2d 157 (C. C. A. 2nd), certiorari denied, 299 U. S. 552; *Union Trust Co. of Pittsburgh* v. *Driscoll*, 138 F. 2d 152 (C. C. A. 3d), certiorari denied, 321 U. S. 764; *Millard* v. *Maloney*, 121 F. 2d 257 (C. C. A. 3rd), certiorari denied, 314 U. S. 636; *Mellon* v. *Driscoll*, 117 F. 2d 477 (C. C. A. 3rd), certiorari denied, 313 U. S. 579; *Cook* v. *Commissioner*, 66 F. 2d 995 (C. C. A. 3rd), certiorari denied, 291 U. S. 660; *Holderness* v. *Commissioner*, 86 F. 2d 137 (C. C. A. 4th).[1]

It is submitted that the view of the statute taken in the above cited cases, and not that of the court below, is the only permissible one. Even where the decedent has limited himself to choosing between beneficiaries whose interests have already been created by the instrument and to designating or altering what each will receive, his control remains dominant. In such a situation the *inter vivos* transfer is purely tentative and the decedent

[1] *Commissioner* v. *Ballard*, 138 F. 2d 512 (C. C. A. 2d), affirming 47 B. T. A. 784, and *Helvering* v. *Tetzlaff*, 141 F. 2d 8 (C. C. A. 8th), relied on by the taxpayer in the court below, are not contrary. In those cases the decedents' reserved powers were subject to conditions which had not occurred and it was decided that the power to alter, amend, or revoke did not actually exist at the time of death.

relinquishes all authority over the disposition of the property only when he utilizes his power of selection or when his death extinguishes his control. In the latter event the gift becomes, as a practical matter, effective at or after the decedent's death and the statute requires that the property transferred be taxed as part of his estate.* While in *Porter* v. *Commissioner*, 288 U. S. 436, the decedent could have chosen new beneficiaries to the exclusion of those named in the instrument, the language of the opinion is equally applicable to the powers reserved in this case and in the above cited cases; the Court said (p. 444):

> But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change

* One need only read the statute to conclude that it is of no consequence that the beneficial interests may remain contingent after the decedent's death. The significant fact is that the transfer from the decedent does not become complete during his lifetime and that the property passes from him completely at his death because of the extinction thereby of his reserved power to subject the previously created interests to changes in enjoyment. Thus, the decedent, at his death, has made a complete disposition of the property even though, at that time, the interests may still be subject to other contingencies. Under the statute, it is enough if, at the date of death, the enjoyment of any interest is subject to any change through the exercise of the decedent's power to "alter, amend, or revoke."

> by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition.

In the present case, too, if any of the sons should die during the duration of the trust, the interest which will go to his issue, or to the other beneficiaries of the gifts-over, will have as its generating source the fact that death terminated the decedent's control and brought to an end his ability to make complete gifts during his lifetime to his then living children.[8]

---

[8] Subsections (c) and (d) of Section 811 of the Internal Revenue Code are, to some extent, similar in reaching transfers where the interests created are endowed with whatever certainty they possess by the grantor's death. It seems apparent that, so far as the beneficial interests are concerned, the effect of the decedent's death may be the same regardless of whether that has released his control, covered by subsection (d), or his reserved property rights, covered by subsection (c). Except for the difference in what was retained by the grantor in these cases, the following language might be equally applicable to the effect of the decedent's death here on the beneficial interests in the trust property. Thus, in *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, it was stated (pp. 110–111):

"'* * * The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment.' Cf. *Reinecke* v.

The third consideration mentioned in the previously quoted excerpt from the opinion below, namely, that the decedent could not alter the benefits received by the beneficiaries, is in direct contradiction of the terms of the trust instrument.[10] As we have already shown (*supra*, pp. 11–17), the decedent could have brought about very substantial changes in the interests of each beneficiary. The importance of the decedent's ability to make such a choice was aptly described in *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733, 736 (C. C. A. 2nd):

Northern Trust Co., 278 U. S. 339, 347. The taxable gross estate, in other words, must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter."

Also, in *Goldstone* v. *United States*, No. 692, October Term, 1944, decided June 11, 1945, not yet reported, this Court said:

"The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property. The existence of such an interest constitutes an important incident of ownership sufficient by itself to support the imposition of the estate tax. *Helvering* v. *Hallock*, *supra*. The indefeasibility of that interest prior to death or the decedent's possession of other powers of ownership is unnecessary and indecisive of estate tax liability."

[10] The Tax Court likewise misconstrued the interests of the beneficiaries. It concluded that the decedent's sons had an interest which was "irrevocably vested," that the decedent could only cause "an acceleration of the time of [their] enjoyment" (R. 18) and that the decedent could not "change or alter the disposition of the trust corpus already given" to them. (R. 18.)

> The Tax Court held, however, that the remainder interests were not includible because no power to alter the remaindermen was reserved. It is true that they could not directly be changed and that in respect to them the exercise of the power to terminate the trusts would but accelerate the date of distribution. Whether that would make a difference in the identity of the takers could not be known before the decedent died since it could not before then be known whether they would be the same, whenever he might terminate the trust, as they would be at his death. This power to accelerate was not only the power to provide that the same remaindermen would get at an earlier date what they were entitled to receive eventually in the same amounts; but was a power to make sure that his living children would have the enjoyment of remainders which otherwise they might not get at all. In this respect it was not a power to bring about merely a slight or trivial change. It enabled the decedent to provide for his children to the extent of their remainder interests immediately as of any time before his death when their circumstances or any other motive might prompt him to do so. * * *

Also, the changes in enjoyment which the decedent could have achieved in this case may be contrasted with those that the decedent could have brought about in *Mellon* v. *Driscoll,* 117 F. 2d 477 (C. C. A.

3d), certiorari denied, 323 U. S. 579, where the transfer was held taxable at death even though the only change which the grantor could have brought about was to give to his children full ownership of property with respect to which they already had a life interest and the power of testamentary disposition, both of which had been irrevocably given. We believe, therefore, that the court below was manifestly in error insofar as its decision rests on the assumption that the decedent in this case could not materially alter the benefits received by the beneficiaries.

B. *The decedent had the power to "alter, amend, or revoke".*—The court below concluded that the decedent here did not retain the power to "alter, amend, or revoke," as that phrase is used in Section 811 (d) (2) of the Internal Revenue Code. It would seem that the court placed undue emphasis on the fact that part of the decedent's reserved authority to make completed gifts to his sons was phrased in terms of the power to "terminate"; and also that it overlooked the fact that the powers reserved in paragraphs Fourth and Eleventh of the instrument gave the decedent the additional authority to distribute part or all of the corpus to any of his sons without terminating the trust with respect to the remainders.

That the decedent could have exercised his control by terminating the trust should not obscure the fact that he would have thereby "altered"

or "amended" some of the interests created and would have also "revoked" all other interests.[11] The history of the legislation and the administrative construction adopted by the Treasury Department demonstrate the invalidity of the lower court's decision.

In *White* v. *Poor*, 296 U. S. 98, the question was raised whether the phrase "alter, amend, or revoke" included the power of a decedent to terminate the trust where that would cause the corpus to be returned to her. This Court decided that the transfer was not taxable because the decedent's control had not been reserved when the original transfer was made, but rather that her authority resulted from her subsequent appointment as a trustee by the beneficiaries and other trustees. As a result, the question concerning the meaning of the statutory language was not considered. In order to clarify and settle the matter, Congress added the word "terminate" to the phrase "alter, amend, or revoke" by Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648. The legislative history of that Section shows quite plainly that the addition of the word "terminate" was not considered as constituting a substantive change in meaning, but was rather deemed to be declaratory of existing law. Thus, the House Committee on

[11] The phrase "alter, amend, or revoke" in Section 811 (d) (2) relates to "any interest" whose enjoyment is subject to change, we submit, and not to the instrument of "transfer", as the court below apparently concluded (R. 41, 42).

Ways and Means (H. Rep. No. 2818, 74th Cong., 2d Sess., p. 10) stated: [12]

> Another change made in subsection (a) of section 206 has been to expressly include a power to terminate along with the powers to alter, amend, or revoke. In the case of *White* v. *Poor, supra,* the Supreme Court did not pass on the question of whether the power to terminate was included in the language relating to a power "to alter, amend or revoke." Since in substance a power to terminate is the equivalent of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed that it is declaratory of existing law.

The Committee Report is cogent evidence of the meaning of the statute prior to its amend-

---

[12] This report was issued in connection with H. R. 12793, 74th Cong., 2d Sess., Section 206 of which contained the amendment here under consideration. While H. R. 12793 was not enacted, the provisions of Section 206, with changes not here material, became Section 805 of the Revenue Act of 1936.

Other changes made by the amendment related to the question decided in *White* v. *Poor, supra*, namely, whether the source of the decedent's power was a controlling consideration. Language was added to the effect that it was not material from what source the power was obtained or in what capacity it was exercisable by the decedent. The House Committee was not certain to what extent this was declaratory of existing law (H. Rep. No. 2818, *supra*, p. 9) and, accordingly, Section 805, as enacted, provided that the amendment should not apply to a transfer made before the adoption of the amendment (June 22, 1936), unless the transfer was taxable under the section prior to that time.

ment. See *Merrill* v. *Fahs*, 324 U. S. 308, 312–313; *Hartley* v. *Commissioner*, 295 U. S. 216, 220–221.

The administrative interpretation of the legislation shows a similar construction of Congressional intent. Section 81.20, Treasury Regulations 105 (Appendix, *infra*, pp. 43–45), provides in part:

> The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," *and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."* (Italics supplied.)

The court below, however, construed the word "terminate" as being used in a "restricted sense only" and as being equivalent in meaning to "revoke," thereby concluding that the transfer is to be taxed only when termination results in a return of the property to the decedent (R. 42).

The court believed that this interpretation was the one adopted by the Treasury Department and that the Treasury Regulations showed that "the word [terminate] was used in this restricted sense only." (R. 42.)[13] The opinion, however (R. 42), inadvertently omitted from the quotation of the Regulations the final portion set forth above in italics which supports the Commissioner's position in this case in all respects. Since the decedent's power to terminate was "so exercisable as to effect a change in the enjoyment" of the

[13] It would seem that, since the contingent interests would be extinguished if the decedent had made absolute gifts of the corpus to his sons, they were just as much subject to revocation as would have been true had they been subject to the same extinction upon a recapture of the property by the grantor. While the Committee Report and the Treasury Regulations use the word "revoke" as meaning a return of the property to the grantor, both may be regarded as illustrative and as not excluding a destruction of interests which does not result in the return of the property to the grantor.

While the language from *Porter* v. *Commissioner*, 288 U. S. 436, 443, referred to by the court below (R. 43) would tend to support the theory that the word "revoke" includes only a revocation of the transfer in favor of the grantor, we believe that the actual decision there does not preclude a holding that "revoke" also includes the destruction or extinction of some beneficial interests in favor of others. That was the manner in which "revoke" was used in *Commissioner* v. *Hofheimer's Estate* (*infra*, p. 32), and in *Mellon* v. *Driscoll* (*infra*, p. 33), where it was concluded that "revoke" had no relationship to the manner in which the corpus would be distributable. At all events, the point seems academic since the words "alter" and "amend" are sufficiently broad to include all changes of this nature, and the *Porter* case so holds.

interests which he created, it "is the equivalent of a power to 'alter'" and the transfer is required to be included in the decedent's gross estate.

While the court below correctly concluded that the meaning of the statute was not changed when the word "terminate" was added by the 1936 Act, the erroneous construction adopted has particularly far reaching consequences because, as interpreted, it excludes from taxation transfers of this nature made after June 22, 1936 (governed by Section 811 (d) (1) of the Internal Revenue Code). It would be strange if Congress had intended that taxation should depend upon the nomenclature employed in the instrument, or upon the method by which alteration or amendment of beneficial interests is achieved. This is particularly true of the estate tax where the admonition has often been repeated that taxation of a transfer does not depend upon "elusive and subtle casuistries" and that "the technical forms in which interests contingent upon death are cast" do not control. *Helvering* v. *Hallock,* 309 U. S. 106, 116–117, 118. It is more reasonable to believe, as the court concluded in the *Hofheimer* case, 149 F. 2d 733, 737:

> It would be strange, to say the least, if the settlor could reserve the same power by choosing to use the word "terminate" instead of "revoke" and by so doing accom-

plish what the statute was designed to prevent.[14]

As has been noted, the result reached below and the construction of the statute adopted are at variance with the view taken by the Circuit Courts of Appeals for both the Second and Third Circuits. In the *Hofheimer* case, *supra*, two brothers created a trust, each contributing one-half of the corpus; the income was payable to a cousin for life and after her death, the corpus was to be divided into two equal shares and was to be distributed to the living children of each settlor, and if not living, to their issue per stirpes. The decedent and his brother reserved the right to change the provisions with respect to the payment of income to the life tenant and they also retained the authority to terminate the trust at any time, thereby giving the corpus to the remaindermen. The Tax Court had ruled that the remainder interests were not includible in the decedent's estate because he could only have accelerated them and because termination in this manner was not included in the statute.[15] The Circuit Court of Appeals for the Second Circuit reversed,[16] stating (p. 736):

---

[14] Compare note 13, *supra*, p. 28.

[15] The Tax Court's holding in the *Hofheimer* case is similar to its holding in the present case that the decedent here only reserved the right to accelerate the time of enjoyment of the beneficial interest already given. See note 10, *supra*, p. 22.

[16] In the *Hofheimer* case, the Tax Court decided that the value of the interest of the income beneficiary was includible

Here the power to terminate was equivalent to the power to revoke as to the life estate and to bring about immediate distribution of the corpus to persons who otherwise might not take any of it at all. The enjoyment of the remainder interests which had been transferred in trust was therefore subject to change through the exercise of decedent's power of termination which was cut off by his death. If this power to change the enjoyment is not merely as to trivial matters it is within the statute. *Dort* v. *Helvering,* 63 App. D. C. 98, 69 F. 2d 836. It did not have to be exercisable by the settlor for his own benefit. *Porter* v. *Commissioner, supra.* The power at any time to change the enjoyment of the remainder interests from an indefinite period in the future by remaindermen whose identity and number were not presently known to the immediate present by individuals who were known cannot be regarded as but trivial. The test is not

---

in the decedent's gross estate, 2 T. C. 773. The Circuit Court of Appeals held that the remainder interest was to be included as well, thus causing the entire value of the transfer, as of the date of the decedent's death, to be taxed. In the present case, too, if the Commissioner's position is correct, Section 811 (d) (2) requires that the value of his entire transfer be included in the decedent's gross estate. Since the income from the trust could be withheld, or could still become payable to the various contingent beneficiaries, and since those interests survive because death released the decedent's ability to extinguish those interests, the value of the interests in the income of the trust as well as the value of the remainder interests in the corpus are to be included.

> whether the change has to be brought about by an acceleration of the falling in date of remainders or in some other particular way but whether the power reserved may be exercised to shift comparatively substantial economic benefits.

The fact that the decedent here retained the same economic power to give ownership to his children or to other beneficiaries who would be known to him at the date of termination, rather than to permit ownership to pass under the trust to beneficiaries who might not be known, has already been pointed out (*supra*, pp. 11–17) and need not be further discussed.

In the *Hofheimer* case, too, the addition of the word "terminate" by the 1936 Act was considered merely declaratory of existing law. As opposed to the decision below, however, the court there did not interpret the statute as precluding taxability where termination would not cause a revesting of the property in the grantor. On the contrary, in the *Hofheimer* case, the court found the words of the statute and the Treasury Regulations sufficient to embrace a termination which would, as here, result in the granting of ownership to known beneficiaries and would foreclose the passage of the property under the trust to persons whose identity was not ascertainable.

The decision below may also be contrasted with that in *Mellon* v. *Driscoll*, 117 F. 2d 477 (C. C. A. 3rd), certiorari denied, 313 U. S. 579, in which

the decedent's two children were given the income from the trust for life as well as the power to appoint the corpus by will. The settlor reserved the power, which he never exercised, to "revoke" the trust, whereupon the principal was to be distributed to the two beneficiaries and the trust was to come to an end. The taxpayer there argued that the decedent had merely reserved the power to "terminate" and, as such, that it was not included in the statute prior to the 1936 amendment. The court rejected this contention, stating (p. 480):

> It is clear that revocation is but a method of bringing a trust to an untimely end and has no relation to the consequent and subsequent fate of its corpus. The "calling back" is of time rather than of space. It seems unnecessary to be troubled by the Treasury's doubts as to the kind of termination or to resort to their ascription of the word itself to "alter" rather than to "revoke".

Referring to the changes in enjoyment which bring the statute into operation, the court said (pp. 478–479):

> We think this inclusion proper and are surprised at its being questioned. The theory of the tax is both old and familiar. The settlor's death, or in the case of the gift tax, his release, ends his power and so passes a valuable assurance of title. The statute has been given a liberal interpreta-

> tion and taxability thereunder found in many different sets of circumstances. A shifting of economic benefits has been stressed. The grantor need not be able to exercise the power for his own benefit and in fact may expressly exclude any alteration in favor of himself. A change of beneficiaries or a change in the amounts they are to take is sufficient. The statute applies even though parties with adverse interests share the power with the settlor. In fact the only qualifications permitted go to a power affecting trivial and unimportant matters and to the retroactive application of the statute if the power is exercisable by the grantor in conjunction with another person.

It seems fairly evident that the changes in enjoyment which the decedent in *Mellon* v. *Driscoll, supra,* could have brought about were far less sweeping than those that the decedent could have achieved in this case. The court below, however, stated that if *Mellon* v. *Driscoll,* were not distinguishable, it should not be followed.[17]

We submit that the obvious loophole in the legislation which results from the decision below was never intended by Congress and that the interpretation of the statute in the *Hofheimer* and

[17] The Tax Court thought that *Mellon* v. *Driscoll* was distinguishable on the ground that there the donor would have recaptured the property and would have made a new gift of it to his children. (R. 16–18.) The Tax Court's analysis of *Mellon* v. *Driscoll* seems patently untenable.

Mellon cases is more closely in accord with the Congressional purpose of taxing transfers whenever the grantor is enabled, by any means, to alter, amend or revoke the interests which he has created, thereby causing a change in their enjoyment.[18]

Estate of Sanford v. *Commissioner,* 308 U. S. 39, relied on in the opinion below for the conclusion that the Commissioner's position goes beyond the scope of the statute, does not support that reasoning. The *Sanford* case involved the gift tax and merely held that even though the donor could not revoke the trust in his own favor, the gift was incomplete so long as he had the power to choose new beneficiaries, and that the gift became effectuated when the donor relinquished his authority of selection. The portion of the *Sanford* opinion quoted below (R. 41) does not, as the lower court seemed to think, imply that the type of transfer involved in this and similar cases would be considered as complete when the trust was established and, consequently, taxable as a gift at that time.[19] Since this Court, in the quoted excerpt from the *Sanford* opinion, was referring to the type of transfers which it had already ruled to be incomplete until the grantor's re-

[18] H. Rep. No. 179, 68th Cong., 1st Sess., p. 35 (1939–1 Cum. Bull. (Part 2) 241, 261); S. Rep. No. 398, 68th Cong., 1st Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 266, 290).

[19] The record does not disclose that a gift tax was paid when the trust was established in this case.

served power was extinguished at death, and since a transfer of the precise nature involved in this case has not been considered by this Court, the opinion has no significant application here.

The taxpayer contends, however (in the brief in opposition to the petition for certiorari (pp. 5–6), and the Tax Court so concluded (R. 19), that the transfer was so complete as to be taxable as a gift when the trust was created and that there would have been no taxable gift if the decedent, during his lifetime, had relinquished his retained power. In support of that contention, the following from Section 86.3, Treasury Regulations 108, promulgated under the gift tax provisions of the Internal Revenue Code, has been urged as showing that the gift tax would be imposed only when the trust was created:

> A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

The above language, however, clearly does not describe the interests created here and the contrary conclusion of the Tax Court undoubtedly stems from its erroneous assumption that, in making the gift, the decedent had merely reserved the power "to accelerate the time of its enjoyment." (R. 18; see *supra*, note 10, p. 22, note 5, p. 17, and note 15, p. 30.) Actually, Section 86.3, of Treasury Regulations 108, provides that the transfer here was not complete when made; it states:

> As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. According, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.
>
> A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. ***A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new***

> *beneficiaries or to change the interests of the beneficiaries as between themselves.* * * * [Italics supplied.]

We think it clear that a gift tax would not properly be imposed when the trust was established. The lack of complete integration between the gift and estate taxes has, however, been noted. *Estate of Sanford* v. *Commissioner*, 308 U. S. 309; *Smith* v. *Shaughnessy*, 318 U. S. 176. In the last cited case it was held that the gift tax may be imposed on an *inter vivos* transfer even though the property might also be considered includible in the grantor's gross estate, the court stating (p. 179):

> It is sufficient to note here that Congress plainly pointed out that "some" of the "total gifts subject to gift taxes * * * may be included for estate tax purposes and some not." House Report No. 708, 72d Cong., 1st Sess., p. 45. Under the statute the gift tax amounts in some instances to a security, a form of down-payment on the estate tax which secures the eventual payment of the latter; it is in no sense double taxation as the taxpayer suggests.

C. *The decedent's power to terminate was exercisable by him as grantor, but, in any event, the capacity in which it was exercisable is immaterial.*—Another contention made by the taxpayer below, but not passed on by the Circuit Court of Appeals, was that the reserved control was

exercisable by the decedent in his capacity as trustee, and that the statute was not applicable on that account.

We believe that the trust instrument reserved to the decedent the power of termination in his capacity as grantor, and not as trustee. The second sentence of Paragraph Eleventh (R. 36) provides that the "Grantor may, during his lifetime," terminate the trust "if deemed advisable by him", and that his son or sons "while acting as Trustee" "may, if deemed advisable by them as Trustee" terminate the trust. We believe that this reveals an intention to give the power of termination to the decedent in his capacity as grantor and was intended to distinguish between the nature of his discretionary authority to terminate the trust as an individual, and the nature of the discretionary power of his sons to terminate the trust in their capacity as fiduciaries. Moreover, comparison of the specific references to the "Grantor" and to the "Trustee" in Paragraph Eleventh, with the general use of the term "Trustee" in the trust instrument to apply to the decedent as well as his successor trustees, is persuasive evidence that the decedent intended to retain, in his capacity as an individual, the authority to terminate the trust.

But even if the trust instrument could be construed in the manner contended for by the taxpayer, the capacity in which the decedent might exercise his control is not a material considera-

tion. The parenthetical phrase "(in whatever capacity exercisable)" was added to Section 302 (d) of the Revenue Act of 1926 by Section 805 of the Revenue Act of 1936. While the legislative history is silent on that question,[20] the amendment has been held to be declaratory of existing law. *Welch* v. *Terhune,* 126 F. 2d 695 (C. C. A. 1st), certiorari denied, 317 U. S. 644; *Union Trust Co. of Pittsburgh* v. *Driscoll,* 138 F. 2d 152 (C. C. A. 3d), certiorari denied, 321 U. S. 764. See Section 81.20, Treasury Regulations 105. The Tax Court has also held that the capacity in which the power is exercisable by the decedent is not material (*Estate of Nettleton* v. *Commissioner,* 4 T. C. 987), and it so conceded in the present case (R. 18). In *Welch* v. *Terhune, supra,* the court said (p. 697):

> Nor does it matter that the trust instrument vested the power in Terhune in his capacity as a trustee named in the instrument rather than in his capacity as grantor. As previously noted, § 302 (d) refers to the existence of the power in the decedent, not to the capacity in which it is to be exercised. So far as we can see, nothing turns

[20] See *supra*, note 12, p. 26. As has been observed, *supra*, p. 25, the decision in *White* v. *Poor*, *supra*, did not rest on the fact that the decedent's control was exercisable in her capacity as trustee, but rather on the fact that her control emanated from her appointment as a trustee by the other trustees and the beneficiaries and that it did not come from any power which she had reserved for herself in the original instrument.

on whether the power now in question is to be described as a fiduciary or non-fiduciary power. It is enough that the grantor had retained in his hands a power, whether alone or in conjunction with others, to vary materially the enjoyment of the numerous property interests.

If, as we contend, the transfer from the decedent was incomplete when made and would become final only when the decedent's control was relinquished, then it seems fairly plain that the capacity in which that control was exercisable by him ought not to govern the imposition of the estate tax. The enjoyment of the interests created was subject to the same degree of change, and the decedent's death gave the same assurance that he could no longer cause any change, regardless of whether his previous authority was that of an individual or that of a fiduciary.

CONCLUSION

The decision of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General
SAMUEL O. CLARK, JR.,
Assistant Attorney General
SEWALL KEY,
HELEN R. CARLOSS,
HILBERT P. ZARKY,
Special Assistants to the Attorney General.

NOVEMBER 1945.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(d) *Revocable transfers.*—(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to

alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph (26 U. S. C. 811).

* * * * *

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

* * * * *

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of de-

cedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also

embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

U. S. GOVERNMENT PRINTING OFFICE: 1949